

telephone delayed message services (PTDMS), because the numbers called are not generated in a random or sequential fashion.⁸³ Voice messaging services used to send personal prerecorded voice messages are not subject to the identification requirements of 227(d)(3) and § 64.1200(d) of our rules because such calls do not use autodialers to transmit prerecorded messages. Moreover, under the rules adopted here, artificial and prerecorded message calls to residences are exempt from the TCPA's prohibitions in an emergency, where the caller received prior express consent, or if the call is exempted by the Commission as either a non-commercial call or a commercial call which does not include an unsolicited advertisement and does not adversely affect the called party's privacy interests. Thus, Automated Alternate Billing Systems (AABS), used by common carriers to perform operator services with artificial or prerecorded voice prompts, are exempt from the prohibition against artificial or prerecorded voice calls to residences to the extent they are non-commercial calls. However, voice message calls, as prerecorded messages, would be subject to the prohibitions of § 227(b)(1) and § 64.1200(a) of our rules. Thus, voice message calls could not be directed to an emergency line, a health care facility, radio common carrier services or other services for which the called party is charged for the call except in an emergency or with the prior express consent of the called party.

48. In light of the foregoing, we believe that the prohibitions set forth in the rules are not a barrier to the continued use and expansion of voice messaging service, and that the rules adopted here will be effective in preventing any potential abuse by telemarketers. See §§ 64.1200(a)-(d). Accordingly, a specific voice messaging exemption is not necessary to permit the present and future voice messaging services.

49. Public Utilities. Many public Utilities note that they communicate with their customers through prerecorded message calls and automatic telephone dialing systems to notify customers of service outages, to warn customers of discontinuance of service, and to read meters for billing purposes. They note that under normal circumstances, customers can continue using their telephones normally as the meter information is being gathered and forwarded to a central office. The utilities urge the Commission to exempt such calls from the autodialer prohibitions, either under the existing business relationship exemption or under the "emergency" exemption for calls related to public health and safety because information about service outages and about possible discontinuance of service affect public health and safety. Moreover, many public utilities state that they have a third party notification service for their customers, in which

⁸³ We emphasize that where such services are used for the purpose of telephone solicitation in violation of our rules and the TCPA, the users of the services, not the carriers providing the services, would be held liable, consistent with Congress' policy that carriers not be held responsible for the content of messages transmitted through the network. See Statement of Senator Hollings, Congressional Record, S 18785 (November 27, 1991). Of course, carriers initiating telephone solicitations on their own behalf using such service would be subject to our rules and the TCPA.

the utility agrees to contact a party designated by the customer in the event that a delinquent bill or a service outage threatens interruption of that customer's service. This program is designed to assist persons who have difficulty maintaining their accounts or who otherwise desire assistance in ensuring that service is not interrupted. However, several commenters express concern that a broad emergency exception could be a vehicle for campaigns targeted at the elderly, who in the past have been subjected to telemarketing calls involving vitamins, security systems, or other items purported to be important to the "health and safety" of the called party.

50. BellSouth concurs with the public utilities and contends that the legislative history⁸⁴ indicates an intent to permit autodialed calls for the purpose of notifying customers of potential power outages, maintenance, or termination. In some jurisdictions, BellSouth is required by tariff to notify customers before disconnecting service. BellSouth requests the Commission to exempt from the prohibitions of § 64.1200(a)(1) autodialed calls regarding the installation, maintenance, or termination of telephone service in emergency situations. Further, Ameritech contends that the use of Automatic Meter Reading Systems by utility companies clearly satisfies the TCPA's requirements regarding prior express consent, and that such services were not intended by Congress to be prohibited.

51. Each of the circumstances described by the utilities is included within either the broad exemption for emergency calls, or the exemption for calls to which the called party has given prior express consent. Service outages and interruptions in the supply of water, gas or electricity could in many instances pose significant risks to public health and safety, and the use of prerecorded message calls could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public. Similarly, public utilities providing a third party notification service do not violate the prohibition against prerecorded calls to residences where the third party has given his or her prior express consent to the notification or the call relates to a public health and safety matter. In light of the comprehensive nature of the current exemptions, a specific exemption for public utilities to the general prohibition against autodialers and artificial or prerecorded voice message calls is not required.⁸⁵

D. Technical and Procedural Standards

1. Line Seizure—5 Second Hang-up Requirement.

52. The TCPA requires, and the rules we adopt provide, that automatic telephone dialing systems used to transmit artificial or prerecorded messages shall automatically release the called party's line within 5 seconds of the time that the calling party's system is notified of the called party's hang-up. The ACA requests clarification of this requirement in order to ensure proper

⁸⁴ Congressional Record, H 11310 (November 26, 1991).

⁸⁵ We emphasize that telephone solicitations as defined in our rules can never be classified as "emergencies." See § 64.1200(b).

compliance. For the purposes of this rule section, the 5 second period begins when the called party's hang-up signal reaches the dialing system of the caller. Commenters generally do not indicate that they anticipate problems in complying with this requirement.⁸⁶

2. Identification Requirements for Artificial or Prerecorded Voice Systems.

53. The TCPA mandates that all artificial or prerecorded telephone messages delivered by an autodialer state clearly the identity of the caller at the beginning of the message and the caller's telephone number or address during or after the message, § 227(d)(3)(A), and we adopt this requirement in our rules, 64.1200(d). A number of commenters request that prerecorded messages be required to state the identity of the caller and the caller's telephone number (other than that of any autodialing system used to place the call) or address within 30 seconds after the message begins, so that the called party would not have to listen to the entire message before deciding whether to hang up. We reject the proposal to require that a telephone number or address be stated within 30 seconds of the beginning of an artificial or prerecorded message, because the TCPA requires only that the caller's identity be stated at the beginning of the message. See § 227(d)(3)(B). We have been presented with no evidence to persuade us to request additional authority to adopt such a restriction. Finally, as suggested by several commenters, we will require callers leaving a telephone number to provide a number other than that of the autodialer or prerecorded message player which placed the call because the autodialer or message player number may be in constant use and not available to receive calls from the called party. § 64.1200(e)(4).

3. Facsimile Machines.

54. The TCPA requires that identifying information be placed on all telephone facsimile transmissions, and that telephone facsimile machines be capable of placing such information on all transmissions. § 227(d). The TCPA further prohibits the use of telephone facsimile machines to send unsolicited advertisements.⁸⁷ § 227(b)(1)(C).

⁸⁶ Commenters point out that the proposed rules, in the prohibition against line seizure, § 68.318, refer to "automatic dialing devices," a term not employed elsewhere in the rules or the TCPA. Reading § 227(d) as a whole, it is clear that the requirement refers only to automatic telephone dialing systems. The title and language of that section will thus be revised to read "automatic telephone dialing systems."

⁸⁷ Mr. Fax and National Faxlist urged the Commission not to impose a ban on unsolicited telephone facsimile advertisements; National Faxlist suggested that a telephone facsimile do-not-call list be created in lieu of a complete prohibition on such unsolicited advertisements. GTE requested clarification that the identification requirement does not apply to each page of messages transmitted through imaging systems.

In banning telephone facsimile advertisements, the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition (see § 227(b)(1)(C)); thus, such transmissions are

Parties commenting on the facsimile requirements for senders of facsimile messages urge the Commission to clarify that carriers who simply provide transmission facilities that are used to transmit others' unsolicited facsimile advertisements may not be held liable for any violations of § 64.1200(a)(3).⁸⁸ We concur with these commenters. In the absence of "a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions," common carriers will not be held liable for the transmission of a prohibited facsimile message. Use of Common Carriers, 2 FCC Rcd 2819, 2820 (1987).

E. Enforcement

1. Private Right of Action

55. The TCPA provides consumers with a private right of action, if otherwise permitted by state law or court rules, for any violation of the autodialer or prerecorded voice message prohibitions and for any violation of the guidelines for telephone solicitations. § 227(c)(5). Absent state law to the contrary, consumers may immediately file suit in state court if a caller violates the TCPA's prohibitions on the use of automatic telephone dialing system and artificial or prerecorded voice messages. § 227(b)(3). A consumer may also file suit in state court if he or she has received more than one telephone call within any 12-month period by or on behalf of the same company in violation of the guidelines for making telephone solicitations. § 227(c)(5). Telemarketers who have established and implemented reasonable practices and procedures in compliance with the latter section may present such compliance as an affirmative defense to any action for violation of telephone solicitation guidelines. § 227(c)(5). The TCPA also permits states to initiate a civil action in federal district court against a telemarketer who engages in a pattern or practice of violations of the TCPA. §§ 227(f)(1) and (2). States retain the power to initiate action in state court for violations of state telemarketing statutes. § 227(f)(6). Finally, consumers may request that the Commission take enforcement action regarding violations of § 227, consistent with the Commission's existing complaint procedures.⁸⁹

banned in our rules as they are in the TCPA. § 64.1200(a)(3). We note, however, that facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. See para. 34, supra. Furthermore, the term "telephone facsimile machine" as defined in the TCPA and identically in our rules, § 64.1200(f) clearly includes imaging systems. The rules state that the first page or each page of a transmission to a facsimile machine must include identifying information.

⁸⁸

See comments of SNET, Sprint, and reply comments of AT 6 T.

⁸⁹

Pacific Bell asserts that complaint proceedings brought under § 208 of the Communications Act, 47 U.S.C. § 208, and based on violations of § 227 of the Act, 47 U.S.C. § 227, could only be instituted against common carriers. Pacific Bell is correct with respect to complaints filed under Section 208 of the Act. In addition to the private right of action noted above, aggrieved

2. State Law Preemption

56. The TCPA, in § 227(e), sets forth a standard for preemption of state law on autodialing, artificial or prerecorded voice messages, and telephone solicitations. The TCPA does not preempt state law which imposes more restrictive intrastate requirements or regulations regarding: the use of facsimile machines to send unsolicited advertisements; the use of automatic telephone dialing systems; the use of artificial or prerecorded voice messages; or the making of telephone solicitations. However, the TCPA specifically preempts state law where it conflicts with the technical and procedural requirements for identification of senders of telephone facsimile messages or autodialed artificial or prerecorded voice messages. § 227(e).

3. Other Matters

57. A number of commenters urge the Commission to request additional authority from Congress to protect consumer privacy interests, arguing that the NPRM errs on the side of protecting commercial speech and does not adequately protect telephone subscribers from invasions of privacy by telemarketers. These commenters point out that telephone subscribers must receive at least one unwanted solicitation before making a claim under the rules. The National Consumers League urges the Commission to withdraw the NPRM and begin the rulemaking process anew, stating that the Commission failed to make specific proposals for meeting the requirements of the TCPA.

58. Based upon our actions here, we find that no further authority is required at the present time to accomplish the goals of the TCPA to restrict unwanted telephone solicitations. The regulations implemented satisfy the TCPA's requirements that residential subscribers be provided with a means to avoid unwanted telephone solicitations, and that autodialers and prerecorded or artificial voice messages be used responsibly in ways that do not impede commerce or threaten public health and safety. The record supports our conclusion that the proposed rules strike a reasonable balance between privacy rights, public safety interests, and commercial freedoms of speech and trade, which Congress cited as its paramount concerns in enacting the TCPA.⁹⁰ Moreover, contrary to the allegation of the National Consumers League, the NPRM asked for comment on a variety of proposals for restricting telephone solicitations to residences and weighed their benefits, as directed by § 227(c) of the TCPA. Specific information on the various proposals was supplied in the comments and our decision is based upon the record. Accordingly, we find at this time that renewal of the

persons or entities may report violations of the TCPA to the Commission and request action on such violations through the informal procedures set forth in Section 1.41 of the rules, 47 C.F.R. § 1.41. See, e.g., 47 U.S.C. §§ 312 and 503(b).

⁹⁰ See Section 2 of the TCPA.

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rulemaking process is not warranted and would unduly delay implementation of consumer privacy protections.

59. However, we are concerned that consumers be fully informed of their rights under the TCPA. In addition to disseminating our own public notices, we will work with consumer groups, industry associations, local telephone companies, and state agencies to assure that the rules we adopt today are well publicized. We also will monitor closely any reports of alleged violations of the TCPA or the rules that are filed with the Commission to determine whether additional action is necessary to protect consumers from unwanted solicitations. If our current approach is not successful, a number of options are available. For example, we could convene a cross-industry board or advisory council to evaluate the complaints received and recommend effective solutions. Both Congress and the Commission have found telemarketing serves a valuable role in our economy, and it is appropriate for responsible telemarketers, who benefit from the activity, to devise solutions to problems. Alternatively, based upon our experience with the rules, it may be necessary to initiate a rulemaking proceeding to establish more stringent restrictions, or even to recommend to Congress that it increase penalties or make other statutory changes. Our objective in this proceeding has been to hold telemarketers accountable for their activities without undermining the legitimate business efforts of telemarketing. Existing Commission procedures will permit us to continue to do so.

IV. CONCLUSION

60. This rulemaking proceeding seeks to protect consumers from automated calls which may pose a threat to health and safety as well as from unwanted solicitations, Section § 64.1200(a) prohibits calls using autodialers or prerecorded messages to emergency lines, health care facilities, and calls to radio common carriers or other numbers for which the called party may be charged for the call. Prerecorded message calls to residences are generally prohibited. We have created specific exemptions to this prohibition where the record demonstrates that the calls do not adversely affect the privacy interests of residential subscribers: non-commercial calls, commercial calls not transmitting an unsolicited advertisement, calls from parties with whom a resident has an established business relationship, and calls from tax-exempt nonprofit organizations. Finally, residential subscribers will be protected from unwanted telephone solicitations by the requirement that telemarketers maintain do-not-call lists for any telephone solicitations.

V. PROCEDURAL MATTERS

61. Final Regulatory Analysis: Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 601, et seq., the Commission's final analysis in this Report and Order is as follows:

1. Need and purpose of this action:

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This Report and Order amends Part 64 of the Commission's rules by adding § 64.1200 to restrict the use of automatic telephone dialing systems and artificial or prerecorded voice messages for telemarketing purposes or for transmitting unsolicited telephone facsimile advertisements. The rules require that persons or entities making telephone solicitations establish procedures to protect residential subscribers from unwanted solicitations, and set forth exemptions to certain prohibitions under this Part. The Report and Order also amends Part 68 of the rules by revising § 68.318(c)(2) and adding § 68.318(c)(3) to require that automatic telephone dialing systems delivering a recorded message release the called party's line within 5 seconds of notification of hang-up by the called party, and to require that telephone facsimile machines manufactured on and after December 20, 1992 must clearly identify the sender of a facsimile message. The amendments implement the Telephone Consumer Protection Act of 1991, which, inter alia, adds Section 227 to the Communications Act of 1934, as amended, 47 U.S.C. Section 227. The rules are intended to impose reasonable restrictions on autodialed or prerecorded voice telephone calls consistent with considerations regarding public health and safety and commercial speech and trade, and to allow consumers to avoid unwanted telephone solicitations without unduly limiting legitimate telemarketing practices.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No comments were submitted in direct response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

The NPRM in this proceeding requested comments on proposed regulations implementing the TCPA and comments on several proposals restricting telephone solicitations to residential telephone subscribers. The Commission has considered all comments and has adopted regulations to implement the prohibitions and technical requirements mandated by the TCPA as well as regulations which allow consumers to avoid unwanted telephone solicitations through placement on company-specific do-not-call lists. The Commission considers its Report and Order to be the most reasonable course of action under the mandate of Section 227 of the Communications Act, as amended.

VI. ORDERING CLAUSES

62. Accordingly, It Is Ordered, that, pursuant to authority contained in Sections 1, 4(i), 4(j), 201-205, 218, and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218 and 227, Parts 64 and 68 of the Commission's Rules and Regulations ARE AMENDED as set forth in Appendix B hereof, effective December 20, 1992.

63. It Is Further Ordered, that, the Secretary shall cause a summary of this Report and Order to be published in the Federal Register which shall include a statement describing how members of the

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public may obtain the complete text of this Commission decision. The Secretary shall also provide a copy of this Report and Order to each state utility commission.

64. It Is Further Ordered, that, this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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Parties Filing Comments

Aberdeen American News
Alpha Information
Altoona Mirror
American Bankers Association (ABA)
American Civil Liberties Union
American Collectors Association (ACA)
American Council of Life Insurance and the National Association of Life Underwriters
American Express Company (AMEX)
American Financial Services Association (AFSA)
American Newspaper Publishers Association (Reply Comments by Newspaper Association of America)
American Resort Development Association
American Service Telemark
American Telemarketing Association, Inc. (ATA)
Ameritech Operating Companies (Ameritech)
Amway
Ann Arbor News
Annenberg School for Communications
Argus Leader
Arizona Republic/Phoenix Gazette
Association of National Advertisers, Inc.
Asheville Citizen-Times
American Telephone and Telegraph Company (AT & T)
Audio Technical
Avon
Baltimore Gas and Electric Company
Baltimore Sun
Banc One Corporation, California Bankers Clearing House Association, First USA Bank, New York Clearing House Association, QVC Network, VISA U.S.A., Inc. a (the Coalition)
Bell Atlantic
BellSouth
Bellingham Herald
Bellville News-Democrat
Blue Cross & Blue Shield
Brazosport Facts
Brewster, Congressman Bill J. aa
Buchan MD, Janet H. and Robert R.C.
Bucks County Courier Times (Mark Gursky)
Bucks County Courier Times (Arthur E. Mayhew)
California Department of Justice
California Public Utilities Commission
Capital Newspapers
Cellular Telecommunications Industry Association
Centel Corporation (Centel)
Center for the Study of Commercialism (CSC)
Centre Daily Times
Chico Enterprise-Record

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Citicorp
Clark County Rural Electric Cooperative
CMS A/R Services
Coalition of Higher Education Assistance Organizations
ComCast Cellular
Community Benefits Corporation
Conservation Fund
Consumer Action
Consumer Bankers Association (CBA)
Contractors Clearing House
Courier-Journal
Cox Enterprises, Inc. (Cox)
CUC International, Inc.
CUNA Mutual Insurance Group
Daily News, Bowling Green, KY (Pipes Gaines)
Daily News, Lebanon, PA (Blake L. Sanderson)
Daily News, Los Angeles, CA (Kirk Felgenhauer)
Daily News, Los Angeles, CA (Lynne Hanchett)
Daily News, Los Angeles, CA (Chuck Schussman)
Detroit Newspaper Agency
Digital Systems International, Inc.a
Direct Marketing Association (DA)
Direct Selling Association
Electronic Information Systems, Inc.
Firelands Rural Electric Cooperative, Inc.aa
Florida Today/USA Today
Forum
Franklinton Financial
Free Press Standard
Gadsden Times
Gannett Co., Inc.a
Gazette Printing Company
Gleaner
Goshen News
Grand Island Independent
Grand Rapids Press
Green Bay Press
GTE Service Corporation (GTE)
Guam Attorney General
Hartford Courant
Household International
Huntsville Times
Idaho State Journal
Illinois Student Assistance Commission
Illinois, University of
Indianapolis Star, Indianapolis News
Independent Telecommunications Network, Inc.a (ITN)
Infiniti Group, Inc.
International Communications Association
International Telesystems Corporation
InterVoice
Inventures
Investor's Business Daily
ITI Marketing Services, Inc.

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Investment Company Institute
J. Blenkarn Systems
J.C. Penney Company, Inc.
Jersey Journal
Johnstown Tribune Publishing Company
Jones Intercable
Journal and Courier
Kalamazoo Gazette/Weekly Gazette, Hometown Gazette
Kauffman Group
King TeleServices
Knight Ridder, Inc.
La Crosse Tribune
Lansing State Journal
LCS Direct Marketing Services
Lee County Electric Cooperative, Inc.
Lejeune Associates of Florida (Lejeune)
Mary Kay Cosmetics
MBNA America Bank, N.A.
MCI Telecommunications Corporation
Merrill Lynch, Pierce, Fenner & Smith, Inc.
MessagePhone, Inc.a
Metrocall
Midland Daily News
Minnesota Attorney General
Mktg. Inc.aa
Mobile Press Register
Montgomery Advertiser, Alabama Journal
Morning Call (Donald J. Belasco)
Morning Call (Richard E. Forgay II)
Mr. Fax
Muskegon Chronicle
National Association of Realtors
National Association of Water Companies
National Consumers League (NCL)
National FaxList
National Retail Federation (NRA)
National Rural Electric Cooperative Association
National Telephone Cooperative Association (NTCA)
NationsBank
New Haven Register
News and Observer
Newspaper Association of America (Initial Comment by American
Newspaper Publishers Association)
New York Department of Public Service
New York State Consumer Protection Board
New York Times
Newsday
Nonprofit Group
North American Telecommunications Association (NATA)
Norwest Card Services
Nynex Telephone Companies
Ohio Newspaper Association
Ohio Public Utilities Commission (OPUC)
Ohio Student Loan Commission

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Olan Mills, Inc.a
Oregonian
Orlando Sentinel
Pacesetter Corporation
Pacific Bell, Nevada Bell (Pacific Bell)
Palm Beach Post
Pennsylvania Newspaper Publishers' Association
Pueblo Chieftain
Pierce-Pepin Electric Cooperative
Pioneer Electric Cooperative
Pitney Bowes
Plain Dealer
PNC Financial Corporation
Press Journal
Princeton Packet, Inc.
Privacy Times
private Citizen, Inc.a (Private Citizen)
Public Forum
Record Journal Publishing
Reese Brothers, Inc.
Review
RMH Telemarketing
Rochester Telephone Corporation
Rocky Mountain BankCard System
SafeCard Services, Inc.a (Safecard)
San Francisco Newspaper Agency
Santa Barbara News-Press
Santa Cruz, County of
Santa Monica, City of
Scottsdale Progress
Sears, Roebuck and Co.
Securities Industry Association (SA)
Sentinel-Record
Shotten 111, Bert K.
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SWBT)
Spokesman-Review, Spokane Chronicle
Sprint a
Star-Ledger
Stockton Record
Student Loan Marketing Association
Sun, The
Syracus Herald-Journal, Post-Standard, Herald American
Tampa Tribune
Tandy Corporation
Teknekron Infoswitch Corporation
Telecheck Services
Telegram & Gazette
Telemarketing Magazine aa
Telocator, the Personal Communications Industry Association
Texarkana Gazette
Texas Public Utilities Commission
Thomas Construction
Thomasville Times-Enterprise

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Time Warner Inc.
Times-Picayune
Union-News. Sunday-Republican
Unisys
United Electric Cooperative, Inc.
United States Postal Service
United States Telephone Association
United Student Aid Funds, Inc.aa
U.S. Intelco Networks, Inc.
U.S. West Communications, Inc. (U.S. West)
USAA Federal Savings Bank
Utilities Telecommunications Council
Vanguard Cellular Systems, Inc.
verde Independent
Vermont Public Service Board
Victoria Advocate
Waco Tribune
Wachovia
Washington State Attorney General
Wells Fargo Bank
West Marketing Services
Western Express Service Company
Wisconsin, State of, Department of Justice
Worcester Telegram & Gazette
Zacson Corporation

(a) also filed reply comments
(aa) filed only reply comments

Appendix B

Title 47 of the Code of al Regulations, parts 64 and 68, are amended as follows:

1. The table of contents for part 64 is amended by adding subpart L to read as follows:

Subpart L - Restrictions on Telephone Solicitation

§ 64.1200 Delivery restrictions.

2. The authority citation for subpart L is added to part 64 to read as follows:

Authority: 47 U.S.C. secs. 151, 154(i), 154(j), 201-205, 218, and 227.

3. Subpart L is added to part 64 to read as follows:

Subpart L - Restrictions on Telephone Solicitation

§ 64.1200 Delivery restrictions.

(a) No person may

(1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice,

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service For which the called party is charged for the call;

(2) Initiate any telephone Call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the

Call is initiated for emergency purposes or is exempted by sec. 64.1200(c) .

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.

(4) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(b) For the purpose of sec. 64.1200(a) the term "emergency purposes" means calls made necessary in any situation affecting the health and safety of consumers.

(c) The term "telephone call" in sec. 64.1200(a)(2) shall not include a call or message by, or on behalf of, a caller:

(1) that is not made for a commercial purpose,

(2) that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,

(3) to any person with whom the caller has an established business relationship at the time the call is made, or

(4) which is a tax-exempt nonprofit organization.

(d) All artificial or prerecorded telephone messages delivered by an automatic telephone dialing system shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player which placed the call) or address of such business, other entity, or individual.

(e) No person or entity shall initiate any telephone solicitation to a residential telephone subscriber .

(1) before the hour of 8 A.M. or after 9 P.M. (local time at the called party's location), and

(2) unless such person or entity has instituted procedures for maintaining a list of persons who do not wish to **receive** telephone

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solicitations made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(i) Written policy. Persons or entities making telephone solicitations must have a written policy, available upon demand, for maintaining a do-not-call list.

(ii) Training of personnel engaged in telephone solicitation. Personnel engaged in any aspect of telephone solicitation must be informed and trained in the existence and use of the do-not-call list.

(iii) Recording, disclosure of do-not-call requests. If a person or entity making a telephone solicitation (or on whose behalf a solicitation is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name and telephone number on the do-not-call list at the time the request is made. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the solicitation is made, the person or entity on whose behalf the solicitation is made will be liable for any failures to honor the do-not-call request. In order to protect the consumer's privacy, persons or entities must obtain a consumer's prior express consent to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a solicitation is made or an affiliated entity.

(iv) Identification of telephone solicitor. A person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. If a person or entity makes a solicitation using an artificial or prerecorded voice message transmitted by an autodialer, the person or entity must provide a telephone number other than that of the autodialer or prerecorded message player which placed the call.

(v) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(vi) Maintenance of do-not-call lists. A person or entity

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making telephone solicitations must maintain a do-not-call list for the purpose of any future telephone solicitations.

(f) As used in this section:

(1) The terms "automatic telephone dialing system" and "autodialer" mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(2) The term "telephone facsimile machine" means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(3) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message

(i) to any person with that person's prior express invitation or permission,

(ii) to any person with whom the caller has an established business relationship, or

(iii) by a tax-exempt nonprofit organization.

(4) The term "established business relationship" means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

4. The authority citation for subpart D of part 68 is revised to read as follows: Authority:

Federal Communications Commission FCC 92-443
[--- Unable To Translate Box ---]

47 U.S.C. secs. 151, 154, 155, 201-205, 218, 227, and 303.

5. Section 68.318(c) is amended by revising paragraph (c)(2) and adding paragraph (c)(3) to read as follows:

§ 68.318 Additional limitations.

* * *

(c) * * *

(2) Line seizure by automatic telephone dialing systems. Automatic telephone dialing systems which deliver a recorded message to the called party must release the called party's telephone line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(3) Telephone facsimile machines; identification of the sender of the message. It shall be unlawful for any person within the United

States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such message clearly contains, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, the date

and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. Telephone facsimile machines manufactured on and after December 20, 1992 must clearly mark such identifying information on each transmitted message.

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B

CAUSE NO. 00-08709-H

CAROL KONDOS, <i>et al.</i> ,	§	IN THE DISTRICT COURT
	§	
Plaintiffs,	§	
	§	
v.	§	DALLAS COUNTY, TEXAS
	§	
LINCOLN PROPERTY CO., <i>et al.</i> ,	§	
	§	
Defendants.	§	160TH JUDICIAL DISTRICT

CLASS CERTIFICATION ORDER

Before the Court is Plaintiffs' motion for class certification. The issue has been extensively briefed, and counsel for all parties appeared for hearing on June 1, 2001. Based on the argument of counsel and the record before the Court, the Court finds that certain of the claims and putative classes should be certified, for the reasons discussed below. The class and claims that the Court finds should be certified are: the TCPA claim of the holders of telephone numbers that were confirmed to have received faxes from ABF on behalf of LPC. This Order constitutes the Court's findings of fact and conclusions of law in connection with class certification.

I. FACTUAL BACKGROUND

Defendant American Blast Fax, Inc. ("ABF") was in the business of sending mass facsimile ("**fax**") advertisements on behalf of its customers to a large number of fax machines. ABF maintained a computer database of fax numbers that could be geographically grouped. Customers would identify the geographic areas they desired to target with their advertisements and enter into a contract with ABF at a price determined



by the quantity of fax numbers in that area. ABF would then transmit mass fax advertisements to the specified numbers. The telephone numbers were identified on a mass basis by automated equipment and the transmissions were sent on a mass basis by automated equipment. ABF did not engage in any recipient-specific process to determine who would receive its advertisements, but rather treated numbers in its database on a collective basis as a group.

Some receiving fax equipment has the ability to confirm for the sender that the facsimile has been successfully received; ABF's practice was to maintain records of those numbers for which transmission was confirmed. Absence of a confirmation does not necessarily indicate that the transmission was not received, as the receiving equipment may not be able or may not be configured to reply with confirmation, or some vagary of telephones may have permitted the transmission to go through but not the confirmation. The presence of a confirmation, however, is highly suggestive that the transmission was successful.

Defendant Lincoln Property Co. ("LPC") is proprietor of numerous apartment complexes in the Dallas area and elsewhere; LPC operates through a sophisticated structure, which does not presently appear to be material to the class certification issues before the Court. The Court will refer to LPC and its affiliates simply as "LPC." In order to market its apartments to prospective tenants, LPC entered into a series of contracts with ABF for mass fax advertising. For some of those contracts, receipt logs exist; for some they do not exist. There is no indication that the missing logs were intentionally

destroyed or misplaced, or that LPC had anything whatsoever to do with the retention or destruction of any logs.

LPC is a significant commercial presence in the Dallas area. its apartments house thousands of people, and have in the past housed thousands more. It is a large employer with numerous present **and former** employees and has commercial relations with numerous suppliers in the Dallas **area**, who likewise have **numerous** employees. It **markets** its **apartments** extensively in the Dallas area and has had contact with numerous prospective tenants. Some of those prospective tenants filled out written forms indicating their interest in leasing an apartment from LPC, and some of those prospective tenants included fax numbers on those forms so LPC to provide **them** with information by fax.

II. LEGAL BACKGROUND

In 1991, Congress passed the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. The TCPA makes it unlawful for any person to "use any telephone facsimile machine, computer, or any other device to send an unsolicited advertisement to a telephone facsimile machine." 42 U.S.C. § 227(b)(1)(C). **An** unsolicited advertisement is "any material **advertising** the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's **prior** express invitation or permission." 42 U.S.C. § 227(a)(4). The TCPA provides a private right of action against a sender of **an** unsolicited advertisement, **id.** § 227(b)(3), with damages of \$500 or actual damages, whichever is greater, for each violation, **id.** § 227(c)(5), which

are subject to trebling by the Court if the violations were willful or knowing. *Id.* § 227(b)(3).

The Court has put off deciding the so-called “EBR” issue as long *as* it practically could do so, but it can do so no longer. The Federal Communications Commission (“FCC”) has reviewed the provisions of the TCPA above and suggested **that** when there is an established business relationship (“EBR”) between the sender and the **recipient**, such a relation can give rise to an inference **that** permission to send a fax is implied from the relationship. In re Rules and Regulation Implementing the TCPA, Docket No. 92-90 (F.C.C. October 16, 1992), at ¶ 54 n.87. The Court gives great deference to the construction of a statute creating a regulatory scheme by the agency charged with administering such regulation, *e.g.*, *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); however, “no deference is due to agency interpretations at odds with the plain language of the statute itself.” *Public Employee Retirement System v. Betts*, 492 U.S. 158, 171 (1989). Here, the FCC’s interpretation of the EBR defense would act to amend the TCPA’s definition of unsolicited advertisement from a fax sent without the recipient’s “prior express invitation or permission,” to a fax sent without **the** recipient’s prior express *or implied* invitation or permission. That interpretation conflicts with the plain language of the statute

Moreover, Congress did expressly provide an established business relationship exclusion in the provisions of the TCPA dealing with telephone solicitations, *see* 47 U.S.C. § 227(a)(3). “Where Congress includes particular language in one section of a

statute and but omits it in another section of the same Act, it is generally presumed that Congress **acts** intentionally and purposely in the disparate inclusion or exclusion.” *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (citations **omitted**). With respect to faxes, then, in contrast to telephone solicitations, Congress intended to limit the effect of prior invitation only to *express* invitations; the FCC’s interpretation **would** effectively delete that limitation from the statute. The Court cannot **support an** interpretation that reverses the effect of the words chosen by Congress. Accordingly, the Court holds that there is no “EBR” or “implied permission” exception to the definition of unsolicited advertisement for faxes.

III. CLASS CERTIFICATION REQUIREMENTS

A. Prerequisites

Rule 42 of the Texas Rules of Civil Procedure governs the requirements for class certification. Rule 42(a) provides for four prerequisites for class certification: numerosity, commonality, typicality, and representativeness. The putative class here numbers in the thousands and is, therefore, sufficiently numerous. The questions of law and fact, as set forth in more detail below, are common among the class members. The claims of the putative class representatives are typical of those of the class. The representative **parties** will fairly and adequately protect the interests of the class.

B. Specific Type of Class Action

The Court notes preliminarily that it finds only Rule 42(b)(4) certification is appropriate. Under the facts of this case, the prosecution of individual actions would not

create a **risk** of inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the class; indeed, there is very little chance ~~that~~ independent actions would be prosecuted at all if this class is not certified. Accordingly, certification under Rule 42(b)(1)(A) is not proper. Similarly, adjudication by individuals would not as a practical matter impair or impede the ability of other members to protect their interests; unlike typical **limited** fund classes, there is not a limited pool of money available to satisfy class members that is being depleted inequitably absent a class action. **As** mentioned, absent a class action there appears to be no individual litigation by putative class members, and certainly not to a degree that threatens LPC's ability to respond to \$500 claims. Accordingly, certification under Rule 42(b)(1)(B) is not proper. Thirdly, although the defendants have acted on grounds generally applicable to the class, this action is primarily for monetary damages and attorneys' fees and does not appear to be appropriate for final injunctive relief with respect to the class as a whole; indeed, it appears that ABF may have been driven out of business, one presumes by claims such as these, and there is no need for prospective injunctive relief. Accordingly, certification under Rule 42(b)(2) is not proper.

The Court now turns to Rule 42(b)(4). That provision requires the court to consider whether common issues predominate and whether a class action is superior to other methods of resolving the dispute. Common issues here include: the manner in which the faxes were sent; whether intrastate transmissions are **within** the scope of the TCPA; whether a principal is liable under the TCPA for the acts of an independent